United Nations A/HRC/WG.16/1/NGO/9

General Assembly

Distr.: General
2 July 2015

English only

Human Rights Council
Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
First session
Geneva, 6–10 July 2015

Joint written statement* submitted by Social Service Agency, Global Policy Forum, Geneva Infant Feeding Association, CIDSE, non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-11135 (E)
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Contributions to the legal building blocks of the Treaty regarding the scope, the state duty to protect and direct obligations for corporations

I. Introduction

The open-ended intergovernmental working group (IGWG), established under the Human Rights Council (HRC) Resolution 26/9, is mandated "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[1] The first two sessions of the IGWG "shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument".[2] The IGWG will have its first session during 6-10 July 2015 in Geneva.[3]

In order to inform the IGWG's work, the undersigned civil society organisations (CSOs), members of the Treaty Alliance, commissioned legal research to legal advisory bureau Global Rights Compliance, Dr Surya Deva and Professor Olivier de Schutter. These are all legal experts who have been engaged in the international debate on business and human rights.

Building on the papers of these legal experts,[4] we have developed a submission with regard to the following elements of the Treaty Proposal:

1. Scope of the treaty
   A. What rights should be covered by the treaty?
   B. To which companies should it apply?
2. State duty to protect
   A. Human Right Due Diligence
   B. Access to Justice
3. Direct obligations for corporations

II. Scope of the Treaty

1. What rights should be covered by the Treaty?

One of the most prominent discussions, both in academic and political circles, is what rights should be covered by the Treaty,[5] with options ranging from focusing on gross human rights to a more inclusive approach. The position of the undersigned organisations is that the Treaty should be inclusive of all human
rights for it to be of any value for victims of business related human rights abuse, which will be argued and substantiated below.
Focus on gross human rights violations too narrow

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1 Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (24 June 2014), para. 1, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

2 Ibid, para. 2.

3 Human Rights Council, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx.

4 Global Rights Compliance. Proposals for a Treaty on Business and Human rights: Part I: Definition of standards Part II: Access to Justice.11 June 2015; S. Deva. Business and Human Rights Treaty: Objects of Regulation/Scope. June 2015; O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 10 June 2015.

5 For instance, see: D. Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (November 30, 2014), http://ssrn.com/abstract=2562760; S Dhanarajan & CM O'Brien, Human Rights and Businesses; 14th Informal ASEM Seminar on Human Rights, ASEM-Hanoi (2014) Available at:
http://www.asef.org/images/docs/Background Paper.pdf (Accessed 21 May 2015).

We are concerned that if the Treaty focuses only on violation of gross human rights[6], this will not be helpful from a victims' point of view, because it will not cover a great majority of human rights abuses committed by companies all over the world. Why should the proposed international Treaty exclude access to remedies for victims of the Rana Plaza building collapse or the Bhopal gas disaster? If the scope of the proposed international instrument is confined to gross human rights violations, it will mostly serve a symbolic purpose
for its ambit will exclude most of the human rights abuses committed by companies in practice.[7]
It is also arguable that calls for negotiating a narrow Treaty that deals only with gross/egregious abuses is reflective, among others, of the Global North's prioritisation of civil and political rights over social, economic and cultural rights.[8] For people living in the Global South – who suffer disproportionately due to corporate- related human rights abuses – the latter set of rights are equally, if not more, important. The displacement of
indigenous people for mining, emission of (and/or exposure to) hazardous chemicals, compulsory pre- employment pregnancy testing of women and illegitimate land grabs by companies concerns fundamental and serious abuses.[9]
We therefore propose that all human rights should be incorporated into a binding Treaty. This should include the rights contained in the core human rights instruments[10] as well as the core ILO conventions related to labour rights and the rights of indigenous people.
The undersigned organisations propose that it should be made clear from the start that when the Treaty refers to human rights, this includes the negative impacts of environmental damages on people. Environmental damage affects rights such as the right to health, the right to life, the right to food, the right to
water, the right to housing (where displacement results from environmental damage, in the form of severe pollution or other disasters), and other human rights including the right to self-determination.[11] A significant proportion of human rights violations alleged to be caused by the activities of transnational corporations have their source in the environmental damage caused by such activities: nearly one third of the 320 cases of alleged corporate-related human rights abuses reviewed by the Special Representative of the UN Secretary-
General on the issues of human rights and transnational corporations and other business enterprises alleged environmental harm to the communities affected.[12]

2. To which companies should it apply?

The issue of regulatory targets revolves around the "footnote" in the HRC resolution, which reads: '"Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.:[13] This footnote is problematic for several reasons. First of all, it lacks conceptual clarity, for all companies –

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[6] There is no definition or consensus yet on what the term "gross"' means. While the term can be interpreted in a broader way by referring to the manner in which the violations may have been committed or to their severity, a narrow understanding limitinggross Human Rights violations to crimes such as torture, slavery, genocide or extra-judicial killings is much more widespread.

[7] Surya Deva, 'The Human Rights Obligations of Business: Reimagining the Treaty Business', page 7, http://business-humanrights.org/sites/default/files/media/documents/reimagine_int_law_for_bhr.pdf.-5

[8] Surya Deva, 'Corporate Human Rights Abuses and International Law: Brief Comments', (28 January 2015), http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/

[9] Ibid.

[10] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

[11] See in particular Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, UN doc. A/HRC/10/61 (15 January 2009); Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights, UN doc. A/HRC/19/34 (19 Dec. 2011); and Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report, UN doc. A/HRC/25/53 (30 Dec. 2013). , The impacts for some peoples could be such that their right to self-determination could be affected, including their right not to be deprived of their own means of subsistence (International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A, art. 1 (Dec. 16, 1966)). As noted in the report by the High Commissioner for Human Rights cited above : "Sea-level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination" (A/HRC/10/61, para. 40).

[12] A/HRC/8/5/Add.2, para. 67.

[13] Footnote 1 of the Human Rights Council Resolution 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (24 June 2014), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

even TNCs – are registered under domestic law of some country. Moreover, if "other business enterprises" include entities with a "transnational character", should they be not already covered within the definition of TNCs? A second and more problematic aspect is that any attempt to define TNCs is likely to prove futile, because an entity could be considered "transnational" in view of multiple alternative variables (e.g., shareholding, operations, business relations, location of offices, nationality of shareholders and directors). The undersigned organisations therefore fear that any attempt to limit its scope by providing a definition of targeted corporations will inevitably result in lawyers advising enterprises how to bypass the given definitional contours.[14]

Since "the corporate form of the abuser is irrelevant" for victims,[15] the proposed international instrument should apply to all types of business enterprises.[16] This approach is consistent with the trend in international law towards adopting instruments which apply to all types of companies, rather than merely TNCs. For example, although the 1976 OECD Guidelines for Multinational Enterprises[17] and the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises [18] were limited to TNCs, the revision of both instruments in 2000 extended their scope to other enterprise too.[19] The 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises[20] and the 2011 Guiding Principles on Business and Human Rights followed this trend.[21]

In order to bridge the divide in the debate of those supporting the footnote and those opposed to it, a hybrid option may be considered. Under this option, while the proposed Treaty would not exclude any business category, its main objective and focus would be on provisions for transnational operations of business (e.g. an obligation on states to regulate the extraterritorial activities of business and to provide mutual assistance between states in investigating violations and in enforcing judgements).

III. State Duty to Protect

A new instrument on business and human rights should define in greater detail the content of the States' duty to protect human rights by regulating transnational corporations and ensuring access to justice for affected people. The duty of the State to protect human rights from being violated by private entities and ensure remedies is well established under international human rights law. Building on the pronunciations of the UN Treaty bodies and special rapporteurs as well as the UN Guiding Principles on Business and Human Rights a new legally binding instrument should clarify that such a duty:

- Includes a duty to impose a due diligence obligation on companies to identify, prevent and mitigate human rights impacts it causes, contributes to or is directly linked to through operations at home or abroad.
- Requires states to provide access to justice to victims and to cooperate with other countries to facilitate the investigation, trial and execution of cases of transnational nature.

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14 Deva, 'Brief Comments', footnote http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/.

15 J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors', http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

16 Darcy argues that a focus on TNCs might be too narrow. Shane Darcy, 'A new business and human rights instrument?', p. 6, https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/. Bilchitz, however, argues that it is defensible to apply the treaty only to TNCs. David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (November 30, 2014), http://ssrn.com/abstract=2562760.

17 OECD Declaration on International Investment and Multinational Enterprises, 21 June 1976, reprinted in 1976, ILM, vol. 15, 967.

18 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 16 November 1977, reprinted in 1978, ILM, vol. 17, 422.

19 S. Deva, Regulating Corporate Human Rights Violations: Humanizing Business (London: Routledge, 2012), 80, 90.

20 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), paras. 20-21.

21 'These Guiding Principles apply to all … business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), General Principles. See also Principle 11 and the Commentary.

1. Human Rights Due Diligence

A new binding instrument should clarify the duty of States to effectively ensure that business complies with the due diligence requirements described in the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises. Under the UNGPs, the process of human rights due diligence (HRDD) entails assessing the actual and potential human rights impacts from its operations; integrating and acting upon the findings made; tracking responses; and communicating how the negative impacts have been addressed. Of particular relevance is the obligation for business enterprises to consult with potentially affected groups and other relevant stakeholders when a potentially adverse human rights risk is identified. This is crucial in order to effectively and satisfyingly address negative impacts on citizens and the environment.

The UNGPs state very clearly that companies can impact all human rights, and in a number of ways: not only by causing the violations, but also by contributing to it, or by being directly linked to the violations through its activities and business relationship.[22] This understanding of due diligence has proven to be extremely valuable in advancing the discussion on the corporate responsibility to respect human rights; from a restrictive discussion focused on sphere of influence to a more encompassing discussion where the focus is on human rights impacts and addressing those. The Treaty should build on this major achievement

However the UNGPs fall short of specifying the concrete steps that States should take to ensure that business enterprises comply with this HRDD obligation.[23] A binding Treaty should clarify the State duty to ensure appropriate, coherent and consistent corporate due diligence. It should include provisions on the extraterritorial scope of due diligence regulation as well as liability for due diligence breaches, as further developed below.

Extraterritorial scope

The State duty to regulate corporate activities is an area where the UNGPs fall behind the current state of international law.[24] Although the Guiding Principles provide that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" the UNGPs recognize only strong policy reasons but no legal obligation to regulate the extraterritorial activities of business.[25] These formulations have now clearly been overtaken by the evolving nature of international human rights law. The obligation of a State to control the conduct of non-State actors where such conduct might lead to human rights violations outside its territory has been explicitly affirmed by various United Nations human rights Treaty bodies, such as the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.[26]

The Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and

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22 Guiding Principle 17

23 Global Rights Compliance,Proposals for a Treaty on Business and Human rights: Part I: Definition of standards, p. 2.

24 O. de Schutter: Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 6

25 Commentary to Principle 2 of the UN Guiding Principles on business and human rights

26 O. de Schutter: Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.6: "The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should "prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law". Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant". Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called upon Canada to "…take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada", recommending in particular that the State party "explore ways to hold transnational corporations registered in Canada accountable"; see also Committee on the Rights of the Child: General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights

cultural rights, which were endorsed by a range of experts and organisations in 2011, clarify the extraterritorial obligations of states on the basis of this developing international understanding. A legally binding instrument should seek inspiration from Principles 24 and 25 of the Maastricht Principles and be explicit about the extraterritorial scope of the state duty to protect.[27]

Liability

The Treaty will not only need to clarify the HRDD obligations throughout the whole range of business relationships, but will also have to include clear provisions of legal liability. The Treaty should elaborate on the modalities in which TNCs and other business enterprises participate in the commission of human rights abuses, including through corporate complicity, responsibility for offences of corporate structures and human rights abuses in supply chains. A Treaty should clarify that by means of HRDD, TNCs and other business enterprises should take all possible efforts and effective measures to prevent negative human rights impacts, and that a breach of HRDD will give rise to legal liability, whether civil, criminal or administrative.

The French Bill on the duty of care in relation to subsidiaries and sub-contractors of French companies is a good example of HRDD regulation. It introduces an obligation for certain business enterprises to adopt a 'due diligence plan' ('plan de vigilance'), which should include reasonable measures to identify and prevent the human rights and environmental risks resulting from their business operations as well as those of their subsidiaries, sub-contractors and suppliers. The company can be held liable on the bases of the Civil Code if it failed to exercise adequate due diligence. In the criminal law context due diligence requirements can be linked to principle liability as well as the legal notion of complicity.

The notion of complicity serves to identify the responsibility of companies where another entity, their business partners (their suppliers or sub-contractors) or the host government, commits human rights abuses, which are considered as criminal offences under either international or internal law. The notion may be examined both in the relationships between the concerned company and its business partners, and in the relationships between that company and the country in which it operates. Where a company is in a joint venture with the host government or with another private actor and has knowledge of, or should have known of, human rights violations committed by that partner in the fulfilment of the agreement, the company should be considered complicit in the violation for not having put an end to the business relationship.[28]

In its 2005 report prepared at the request of the Commission on Human Rights, the Office of the High Commissioner for Human Rights states that: Four situations illustrate where an allegation of complicity might arise against a company. First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement [29]; third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.[30]

Legal liability provisions will also need to ease the burden of proof. For those affected by corporate injustice, the complex organisational processes within a company and its business relationships are difficult to determine and prove. Therefore state regulation should shift the burden of proof from the claimant to the defendant, for example by enshrining the concept of HRDD as a defence in legal proceedings.[31]

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[27] Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

[28] O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 21

[29] Although, in the description of this category of complicity, reference is made only to the business partner of a company which is a government, the same reasoning should hold for the situation where the business partner is a private understanding. This is confirmed by the OHCHR Briefing paper, 'The Global Compact and Human Rights : Understanding Sphere of Influence and Complicity' referred to above, supra n. 43, which describes as 'complicity in case of joint venture' as the situation where 'the company has a common design or purpose with its contractual partner to fulfil the joint venture. It knew or should have known of the abuses committed by the partner'.

[30] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005, UN doc. , para. 34 (citing International Council on Human Rights Policy, Beyond Voluntarism: Human rights and the developing international legal obligations of companies, (Geneva, February 2002), pp. 125-136).

[31] GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 8. "However, it has to be borne in mind that this has to be approached carefully in criminal proceedings that generally, but not always, demand that the burden of proof is placed on the prosecution. Such inversion of the burden of proof may arise in criminal matters but on an extremely limited basis and then only on the balance of probabilities, and not the beyond a reasonable doubt standard."

1. Access to Justice

Despite a State duty to provide access to a judicial remedy being embedded within both international Human Rights Law and the UNGPs, victims continue to face barriers that obstruct their access to justice.[32] The urgent need to provide enhanced access to justice requires rigorous investigation of options,
at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities.[33] Domestic remedies may lack reach and enforcement power. The Treaty should create and support a mutually reinforcing remedy regime that
provides for a vibrant relationship between different adjudicative mechanisms at both the domestic and international level.[34]

In addition to creating a strong monitoring mechanism at the international level the Treaty should specify the state duty to provide access to remedies by including provisions on extraterritorial jurisdiction and mutual legal assistance, as further developed below.

Extraterritorial jurisdiction

A majority of violations occur in weak governance zones or conflict-affected areas, where a lack of an independent judiciary or fully functioning courts impedes access to justice for victims. In situations where host states are either unwilling or unable to provide access to justice-related mechanisms for victims of human rights violations by transnational corporations, extraterritorial jurisdiction is of crucial importance. This problem is recognized by the UN guiding principles on business and human rights which state in the commentary that "[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed" include the situation "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim", thus acknowledging the duty of
the State to provide access to remedies in home State courts for human rights violations occurring in a host State, whenever victims cannot have access to effective judicial remedy in that State.[35]

A number of UN Treaty bodies recommendations have stated the state duty to provide redress for violations committed by corporations abroad.[36] The Maastricht principles affirm this duty in Principle 36 indicating that "States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations".[37]

A Treaty should therefore:

> oblige states to take necessary measures to ensure through judicial, administrative, legislative or other appropriate means, that those affected have access to effective judicial remedy:
> when human rights abuses occur within their territory and/or jurisdiction ; and
>
> when human rights abuses occur outside their territory and/or jurisdiction, but the abuses are committed by an entity which (i) is owned (partly or fully) by a corporation which has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned, or (ii) has a business relationship with such a corporation.[38]

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32 G Skinner, R McCorquodale and OD Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (The International Corporate Accountability Roundtable [ICAR], CORE and The European Coalition for Corporate Justice 2013) 66.

33 Human Rights and Transnational Corporations and other Business Enterprises, UNGA Res 17/4 (6 July 2011) UN Doc A/HRC/Res/17/4, para. 6(e).

34 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 1.

35 O. De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p. 11

36 The CRC, for instance, put it clearly in its concluding observations on Turkey, urging the country to "examine and adapt its legislative and administrative framework to ensure legal accountability of business entities domiciled in Turkey and their affiliates operating abroad with regard to violations of human rights, especially child rights, committed in the territory of the State party or overseas, establish monitoring mechanisms, investigate and redress such abuses with a view to improved accountability, transparency and prevention of violations". Under the International Covenant on Civil and Political Rights (CCPR), the Human Rights Committee noted in 2012 in a concluding observation relating to Germany: "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."

37 Principle 36, Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

To ensure the supremacy of Home States, the Treaty could include a 'consultation clause' providing that a Home State, intending to exercise its extraterritorial jurisdiction, has the obligation to consult the Host State about its intention to initiate proceedings. If the Host State refuses to pursue the case or does not respond, the Home State could proceed.[39] According to Olivier de Schutter such a consultation could be 'a powerful incentive on the Host State to adopt the necessary measures ensuring that the human rights violations be remedied and, if necessary and in compliance with the legal principles of its national legal system, sanctioned.'[40]

Mutual legal assistance

Extraterritorial jurisdiction risks being ineffective if the host State opposes the litigation and decides not to cooperate with such an investigation.[41] And where the host State exercises jurisdiction it is dependent on home State cooperation for the execution.

In international law it is increasingly acknowledged that, in transnational situations, States should cooperate in order to ensure that any victim of human rights violations caused by the activities of non-State actors has access to an effective remedy. Extraterritorial obligations of international cooperation are already contained in several human rights treaties, such as the Convention on the Rights of Persons with Disabilities, the International Convention for the Protection of all Persons from Enforced Disappearance as well as in the first two Optional Protocols to the Convention on the Rights of the Child. The Maastricht Principles reaffirm this State duty in principle 27 stating that States must cooperate to ensure an effective remedy for those affected.[42]

A new instrument should build on this State duty to cooperate This approach would allow the State party to better discharge its duty to protect human rights by regulating transnational corporations, since the State concerned would benefit from the assistance of other States parties implicated in a situation covering different jurisdictions. This would facilitate in particular the collection of evidence, including the hearing of witnesses and access to financial records, the freezing and confiscation of assets; and the enforcement of judgments delivered against the corporations concerned.[43] It would, therefore, be less easy for the transnational corporation to seek refuge behind the multinational dimension of its activity, in order to escape liability for human rights wrongs it may have committed.[44]

In order to clarify what might be included in a new international instrument providing for legal mutual assistance to combat human rights violations by transnational corporations, inspiration may be found in chapter IV of the United Nations Convention against Corruption (UNCAC).[45]

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38 Suggestion by O. de Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 Jue 2015, p. 11

39 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 6: See eg. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 25(8), which provides that, where more than one state claims jurisdiction over an alleged offence, "the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution."

40 O De Schutter, Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations, CRIDHO Working Paper 2010/5 (2010).

41 D Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty', (2015). Available at: http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf (Accessed 21 May 2015).

42 Principle 27 Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights: http://www.etoconsortium.org/en/library/maastricht-principles/

43 Cooperation between States in holding perpetrators accountable is already taking place when it comes to international crimes. For example, the European Network of contact points for prosecuting international crimes is a network of prosecution authorities, and was established to ensure close cooperation between the national authorities in investigating and prosecuting international crimes by exchanging information on investigation and prosecution, facilitating cooperation and assistance between law enforcement and judicial authorities, exchanging best practices, experiences and methods, and raising awareness. See: http://eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx

44 O. De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.25

45 GRC, Proposals for a Treaty on Business and Human rights: Part II: Access to Justice, p. 9; O. De Schutter.

I. Direct obligations for corporations

There is much debate on whether and how a new legally binding instrument could directly address corporations. The added value of a new legally binding instrument imposing direct human rights obligations on transnational corporations would depend on whether or not the supervisory and enforcement mechanisms included in such an instrument go beyond the protection already afforded by the human rights Treaty bodies and the Special Procedures of the Human Rights Council.

One form this could take is for the Treaty, open to signature and ratification, to engage States to accept that all transnational corporations under their jurisdiction are subjected to some form of control, more robust than the existing monitoring mechanisms. In other terms, by ratifying this instrument, a State would express its consent to a new monitoring and enforcement mechanism applying directly to the transnational corporations under its jurisdiction: where it is alleged that a human rights violation has been committed by such a corporation, that State would agree that the corporation itself would have to respond to such allegations before an international mechanism, unless the violation has been addressed through legal remedies available within the State concerned.

A Treaty thus conceived could provide a significant incentive for the State to improve the remedies available in the domestic legal order to victims of corporate human rights harms, as well as for the corporations concerned to prevent, and where necessary remedy, any such harm. However, it would be important to avoid a situation in which the possibility to directly hold a corporation accountable under such a mechanism, would allow a State to circumvent its own specific duty to protect human rights by regulating the conduct of corporations under its jurisdiction. Thus, direct obligations for corporations should be seen as

complementary to the suggestions above aiming at strengthening the duty of the State to protect human rights and at clarifying the scope of such a duty.[46]

II. Conclusion

Together with other members of the Treaty Alliance, we underline that "[t]he enhancement of the international human rights system in relation to TNCs and other business enterprises is urgent and needed."[47]

Our organisations work with communities and individuals currently suffering abuses and violations of their human rights as a result of business activity. Concrete action is needed to protect women and men seeking to defend their rights and the environment in the face of harmful corporate practice and to address the denial of access to justice to communities in numerous countries.

During the June 2014 UN Human Rights Council session which saw the adoption of Resolution 26/9, there was general recognition by States of continuing gaps in the UN business & human rights framework, particularly in relation to ensuring access to justice. It is now time to open constructive discussions in the IGWG towards developing an international legally binding instrument that can make an important contribution to effectively stopping the occurrence of human rights abuses by businesses on the ground.

Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.26

[46] O.De Schutter. Towards a New Treaty on Business and Human Rights: A Review of Options. 22 June 2015, p.18

[47] Second treaty alliance statement: http://www.treatymovement.com/statement

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SOMO- Centre for Research on Multinational Corporations and International Baby Food Action Network (IBFAN), NGOs without consultative status, also share the views expressed in this statement.